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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings	)))	GN Docket No. 95-21

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APR 28 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

REPLY COMMENTS

BellSouth Corporation and BellSouth Telecommunications, Inc. (collectively "BellSouth"), by their attorneys, hereby submit reply comments in support of the Federal Communications Bar Association's ("FCBA") comments submitted in response to the Commission's *Notice of Proposed Rule Making*, 60 Fed. Reg. 8995 (Feb. 16, 1995) ("*NPRM*"). [1]

The purpose of the *NPRM* was to create simpler, clearer, and less restrictive rules governing *ex parte* presentations which comply with "fundamental principles of fairness." *NPRM* at ¶ 1. Both BellSouth and the FCBA submitted comments which applauded these goals. The FCBA expressed concern, however, over the Commission's proposal to adopt a "permit-but-disclose" rule with regard to virtually all proceedings, regardless of whether rulemaking or adjudication is involved. *See* FCBA Comments at 5-7. BellSouth shares the FCBA's concern and urges the Commission to retain the distinction between rulemakings and adjudications by

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[1] BellSouth also wishes to respond to Sprint's implication that BellSouth intentionally withheld the results of a PNR & Associates study until shortly before the sunshine period in CC Docket 94-1. *See* Sprint Comments at 3 n.2. It should be noted that submission of the study was precipitated by a need to respond to unsubstantiated claims made by other parties shortly before the sunshine period. Although Sprint is correct that the data for the study was collected in the Spring and Summer of 1994, PNR & Associates did not complete entry of the data into a database until Fall 1994. Thus, analysis of the data did not begin until Fall 1994 and was not finalized until March 1995 when it was promptly reported to the Commission in the *ex parte* filing.

not adopting a permit-but-disclose rule for adjudications and quasi-adjudications.

The Commission proposed not to continue its prohibition on *ex parte* contacts in adjudicatory proceedings and to allow these contacts pursuant to a permit-but-disclose rule (except with regard to matters designated for hearing). Although the Commission's proposal would certainly simplify the rules by making one standard apply to all proceedings, it also may have the unintended affect of compromising the integrity of the Commission's adjudicatory process. As the Commission itself recognized, the D.C. Circuit has indicated that "ex parte presentations compromise the fairness of a proceeding where they reflect '[s]urreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record.'" *NPRM* at ¶ 18 (quoting *Louisiana Ass'n of Independent Producers v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992)). The Commission also recognized that similar principles have led courts to conclude that "decision-makers should be insulated from ex parte contacts whenever agency action resembles judicial action -- including adjudication and quasi-adjudication. *NPRM* at ¶ 19 (citing *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981); *Power Authority of New York v. FERC*, 743 F.2d 93, 110 (2d Cir. 1984).

The FCBA took exception to the FCC's proposal to extend the permit-but-disclose rule to adjudications, finding that it "would distort and compromise the adjudicatory process." FCBA Comments at 5. BellSouth agrees. Pleading cycles are established to provide an opportunity for opposing parties to present their "best case" to the decision-maker and to rebut the allegations of an opposing party. A permit-but-disclose approach will extend these cycles endlessly. At present, parties are fully able to ask leave of the Commission to file additional pleadings based on subsequent developments. Additionally, parties are entitled to have meetings with the decision-maker after the close of the pleading cycle if all interested parties have been invited.

As the FCBA points out, by allowing *ex parte* contacts pursuant to a permit-but-disclose requirement, pleading cycles will become virtually irrelevant. *See* FCBA Comments at 6-7.

Unlike a pleading cycle, there is no requirement that an opposing party be given an opportunity to rebut evidence or allegations made by another party during an *ex parte* presentation before a decision is rendered. Thus, by making an *ex parte* presentation after pleadings have been filed, a party increases the chance that an opposing party will not have time to rebut its presentation, especially if the presentation is made relatively late in the adjudicatory process. By the time an opposing party becomes aware of the presentation, a decision may already have been reached. More importantly, judicial review of such cases is greatly complicated because it may be unclear what constitutes the record on review.[2]

For similar reasons, the FCBA concluded, and BellSouth agrees, that "no apparent public interest would be served by such a [permit but disclose] procedure that cannot equally well be served by requiring parties in such proceedings -- when they feel a need to supplement the authorized pleadings -- to submit such supplementation in the form of a written presentation, accompanied by a motion for leave to submit the same outside of the authorized pleading cycle, and with service of copies of both supplement and motion upon all interested parties." FCBA Comments at 7.

On the other hand, if a permit-but-disclose rule is adopted for adjudicatory and quasi-adjudicatory proceedings, BellSouth also agrees with the FCBA that the Commission should require the party making such a presentation to serve copies of the presentation, if written, or summary thereof, if oral, to all interested parties. *See* FCBA Comments at 7 n.5.

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[2] BellSouth suggests that, in an adjudicatory settings, *ex parte* contacts should be permitted only in situations where parties have been given an opportunity to object and the opportunity has passed without any objections being filed.

CONCLUSION

For the forgoing reasons, BellSouth urges the Commission to retain the distinction between rulemakings and adjudications by retaining the current prohibition on *ex parte* contacts in adjudicatory and quasi-adjudicatory proceedings and adopting the proposed *ex parte* rules for rulemakings only.

Respectfully submitted,

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April 28, 1995